INTRODUCTION

> *How is it that in all these years no one has come seeking admittance but me? . . . No one but you could gain admittance through this door, since this door was intended only for you. I am now going to shut it.*
>
> (Kafka 2005: 198)

This book examines legal institutions in Chinese and Indonesian contexts where the law is often assumed to be weak or unimportant. By categorizing legal regimes along multiple dimensions of politics and day-to-day functioning, rather than along a simple continuum, and then unpacking the micro-level internal dynamics of each type based on over two years of field research between 2006 and 2014, we can begin to understand what makes law work and how it governs interactions between states and societies, as well as between citizens themselves, in diverse authoritarian and developing country settings. Yet, a tendency to minimize law in the study of politics in these countries has imbued even many of the most perceptive insider analyses.

"The sum of justice in this country amounts to nil!" proclaimed the head of a rural district court in Indonesia when interviewed in October 2014, arguing that formal rules and structures were of little utility in promoting anything other than basic dispute resolution. Fourteen years earlier, an eminent Chinese legal scholar – and future dean of Beijing University's Law School – famously dismissed both teleological notions of China's "progress" toward a Western-defined "rule of law" and any notion that rural Chinese citizens understood or cared much about formal laws or juridical processes (朱 2000; Ji 2009: 134–5). Both close observers offer reasoned and powerful critiques of a prevailing conventional wisdom that as formal legal knowledge and practice spread throughout their populations, diverse states' legal norms and structures would begin to converge toward a common standard rule of law. But both also remain trapped by a

normative and ideal-typical – ultimately, Anglo-American – rule of law; one that occludes other forms of systematic legal knowledge or practice.

My step is to retreat from this simplistic conceptualization to think about how law actually works in citizens' lives and in society at the grassroots. This lets us see that farmers, workers, and small business people are often very well-informed, even deviously savvy, in their use of formal law and legal structures. But, more importantly, legal institutions promote and protect specific political and social relationships – frequently very different ones from those usually implicitly thought to underpin a rule of law, though no less meaningful, legitimate, or systematic – even as they themselves are founded upon the basis of political decisions and power relations.

CHICKENS, FERTILIZER, AND LEGAL REGIMES

Sometimes the ways small private actors harness the power of public legal institutions can reveal much about the relations those institutions support. In 2006, a businessman imported a cargo of fertilizer into the Indonesian port of Surabaya, a bustling city of three million people and capital of East Java, with the intent to sell this on to farmers in his home region of Kupang, on the island of Timor in the far Southeast of the country. Everything appeared to be in order and the goods landed in Surabaya without incident. Soon after, however, he was arrested after a competitor reported his allegedly illegal importation of cargo intended for sale. The fertilizer was impounded and the businessman forced to undergo a lengthy trial in Surabaya. When I was able to observe part of his trial and interview him and his lawyers in 2010, the outcome was far from certain and the poor businessman had to commute regularly between Kupang and Surabaya (a three-hour flight), all the while facing the potential of a devastating conviction and lengthy prison term. The case hinged on technical measurements of the volume of fertilizer and possible minor issues with the customs documentation, but it was unmistakably an instance of mobilization of the coercive power of criminal law in the service of a private actor – his clever and well-connected, though unscrupulous, business competitor.

In a locally well-known story (told to me by several lawyers in Chengdu in 2006), a farmer in Southwest China's Sichuan Province

contracted to sell hundreds of live chickens to another farmer in the East Coast province of Shandong. Payment was received successfully, but the Sichuan farmer never sent the chickens. After several notices, the Shandong farmer had no choice but to file suit for breach of contract. The Sichuan farmer did not contest the suit and a judgment was duly issued against him, ordering him to pay back the money or turn over the chickens. After several attempts, a team from the court's enforcement division (执行庭) appeared at his farm several months later to seize the chickens (and presumably transfer them on to the farmer still waiting in Shandong). To the officers' surprise, the farmer had already crated the chickens and prepared them for shipment. He even explained that the court costs and whatever other fees he might owe would amount to far less than the shipping costs he would have had to pay out of pocket had he sent the chickens on schedule, not to mention his additional income from several months' worth of eggs laid by the hundreds of chickens he had yet to send. The seemingly naïve farmer in Sichuan had expertly manipulated the Chinese civil litigation system to his advantage, even by forfeiting the suit.

These stories of legal system failure or abuse are certainly not unique to Indonesia or China. Nor are they necessarily representative of all aspects of those countries' legal orders. But they do speak to what is often perceived as a less-than-perfect rule of law: dependable and transparent accountability, consistently enforced through legal structures and institutions, whether in business disputes, criminal trials, or rectifying administrative wrongs. Simply acknowledging that developing authoritarian or newly democratic countries lack what European or American scholars would consider rule of law is not particularly illuminating, as indeed the judge and professor referenced earlier noted. Neither are endless hair-splitting conceptual debates over whether or not we can admit that such counties might have "thick," "thin," "socialist," or some other hyphenated or partial rule of law. It is far more interesting to analyze how courts and legal institutions actually work outside the classic Western democratic core.

While many have addressed issues of legal reform, mostly from a formal and normative perspective focused on writing new rules, and others have examined popular perceptions of or engagement with the law, few have analyzed quotidian judicial politics in non-democracies and new democracies in the developing world from an institutional perspective.

This book examines courts and legal institutions in China and Indonesia, the world's largest and fourth largest countries and largest authoritarian and newly democratic states, where little research has been undertaken on this or related topics. I offer a novel conceptual and theoretical framework for understanding the interplay of politics, society, and the legal system across a wide variety of contexts. I do this through the conceptual lens of legal regimes, which I define as frameworks of relationships between institutions and actors that structure the politics of the application of legal rules and the social effects of that application.

RULING BEFORE THE LAW

Another classic story offers guidance on where to begin. "Before the Law" is a parable related to Joseph K by a sympathetic priest he encounters in the Cathedral, soon before his execution at the conclusion of Franz Kafka's masterful allegory of legal politics, *The Trial*.[1] In the parable, a man from the countryside seeking justice is compelled by an imposing gatekeeper to wait outside the mystical "Door to the Law" for most of his life. Soon before expiring, he convinces the gatekeeper to reveal a nugget of cruel wisdom – the door was intended only for this one man and only he could ever have entered through it. States and political orders likewise arrive at legal regimes via their own individual paths. All states follow different routes to different doors, that they may or may not enter, but their wanderings represent similar quests; for certain pathways lead to specific legal regimes and those regimes have much in common with each other, even across national and temporal boundaries. Before we can access what lies within the legal system, we need first to understand how the ways a country is ruled shape the contours of its legal regime.

[1] My approach to this parable differs somewhat from that offered by Ewick & Sibley (1998) in their typology of "before the law, with the law, and against the law," as well as those of many others in the broader law and society tradition, who tend to see the story from the perspective of access to justice and with questions in mind regarding how individuals and social actors remote from the legal system approach powerful and often aloof institutions. Indeed, my perspective is closer to the examination of law as being "in force without significance" (Agamben 1998: 49–51, referencing Kant's concept of the "pure form of law") and, yet, also existing in a multitude of highly differentiated forms, each with distinct and often contradictory power over specific subjects or in particular situations (Agamben 1998: 49–58).

Rule of law is a concept much debated in modern social science and throughout history. Perhaps the most parsimonious and clear definition is of a system in which all agencies and officials are subject to a principle of "legality" (or at least to the rules that they themselves make) and in which citizens are able to know and to test that principle and officials' adherence to it (Berman 1983; Merryman 1985). Of course, neither China nor Indonesia has met such a standard in any straightforward way at any time since 1949. If we allow for a less teleological or normative concept, we can get much more mileage for the analysis of how law rules and is ruled rather than simply measuring all systems against an explicit or implicit standard template. I suggest a new conceptual framework, *legal regimes*, that differs from dominant ideas about rule of law, yet nevertheless specifies principles around which different legal orders are organized in a wide range of diverse contexts.

Such macro-level concepts are best illuminated when translated to the actual functioning of courts and legal institutions at the grassroots. Rather than engage in an abstract, and dangerously abstruse, pure discussion about rule of law or legal regimes, I seek to get beyond constitutions and supreme courts to compare the relationships between law and politics as expressed through the work of basic-level courts in two important countries. By analyzing how Chinese and Indonesian courts have adjudicated criminal and civil cases since 1949, I explain core interactions of citizens with the legal system and of the legal system with other parts of the state and political order. In doing this, I also address several larger empirical questions and theoretical debates.

In most political contexts across all countries, criminal law is the primary mode through which the state exercises its monopoly on legitimate violence. Civil law serves as the state's framework for governing interpersonal relations and economic transactions. Both are thus key, in ways that extend far beyond debates over concepts of the rule of law, to crafting the political and social arenas inhabited by citizens. As the most influential remaining Communist state and largest majority Muslim nation, respectively, China and Indonesia have an importance beyond even their size. They have legal systems rooted in different subsets of the Continental Civil Law tradition that also carry specific historical legacies of state socialism and colonialism that share many common features with a variety of other countries around the world. Understanding the shape and dynamics of this arena in China and Indonesia helps substantially reorient research on law and society in

nondemocratic, newly democratic, postcolonial, and other developing countries.

By examining how ground-level courts and legal institutions function in China and Indonesia, we can bring a new perspective to the study of law and society and judicial politics. This book also contributes significant new data to the understanding of Chinese and Indonesian politics and constitutes the most comprehensive political analysis to date of either country's legal system at the grassroots, where citizens most often interact with state judicial power. This renewed micro and empirical emphasis, combined with a more flexible conceptual and theoretical approach, should facilitate further fruitful analysis of legal systems beyond advanced industrial countries and the Anglo-American Common Law tradition, even as it also fills in crucial gaps in our knowledge of Chinese and Indonesian politics.

BACKGROUND AND SIGNIFICANCE

Most research in political science has traditionally centered on activities and actors remote from the legal system. When addressed, the analysis of courts and other legal institutions in politics is usually confined to supreme or constitutional courts (Shapiro 2008). Other fields, notably anthropology, law, and sociology, have paid more attention to the wider politics of legal systems, but literatures in these disciplines have also had their limitations. Sociologists and anthropologists have frequently concentrated on social perceptions of the legal order or judicial processes by those outside the system, examining the functions of courts themselves only when this affects popular access to or attitudes toward justice. Legal scholars have often tended toward the other extreme, confining their analyses to formal written rules governing judicial conduct, rather than engaging in more direct empirical studies of the behavior of legal actors and institutions.

Scholars across all fields have disproportionately concentrated their research on the United States and other countries whose legal traditions are rooted in English Common Law, very often with a narrow lens trained on constitutional decisions of the US Supreme Court (Shapiro 1989, 2008). With relatively few exceptions (including recent studies of Latin American and Middle Eastern countries, e.g. Brinks 2007; Moustafa 2007), research on legal systems in the Civil Law tradition has centered on relatively stable democracies in Continental Europe (e.g. Merryman 1985) and, to a lesser degree, Japan (e.g. Oda 2009).

Though it has been over thirty-five years since Martin Shapiro's seminal work on the comparative political analysis of courts and legal institutions (Shapiro 1981), relatively few researchers have examined courts in developing, authoritarian, or newly democratizing countries.

Most studies of the role of courts and legal institutions in the process of democratization have restricted their attention to constitutional courts (e.g. Ginsburg 2003), while research on courts in authoritarian contexts is even less developed. Indeed, only since about 2005 has the analysis of authoritarian legal institutions become fashionable, with a general view to explaining how legal reform can legitimize authoritarian control or promote market reform and economic development (e.g. Clarke 1996b; Moustafa 2007; Moustafa & Ginsburg 2008). Especially notable is that recent scholarship has tended to place civil litigation at the core of its analysis, despite the fact that criminal law remains a crucial mechanism of social and political control, as intended when the legal infrastructures of many non-democracies were first developed at key moments of regime consolidation (Jowitt 1992: 88–95; Solomon 1996).

China imported much of the Soviet legal system in 1949 (particularly in the realm of criminal prosecution), but grafted this onto an already relatively well-established legal order that had been cemented in the Qing Dynasty legal codes and modified by the German and Japanese-influenced Republican legal system adopted after 1911. The hodgepodge of city-states, sultanates, and traditional kingdoms that eventually declared independence as a united Indonesia in 1945 functioned according to myriad systems of customary law (later termed *hukum adat*) before the imposition of Dutch law (*hukum Belanda*) beyond Batavia under colonial rule in the nineteenth century, thereby creating a system of overlapping legal orders that persists in some ways up to the present day (Lev 1972; 2000c; Bedner 2001) in an extreme example of what has been termed institutional layering (Mahoney & Thelen 2010). Since 1979, China's leaders have struggled to reform and strengthen the country's legal system, while bringing it under increasing central control. Indonesia, since 1998, has attempted to rationalize and bolster legal institutions, while offering them greater local autonomy, in order to increase public trust in government (especially local government), support democratization, and enhance the legitimacy of the national state in the context of rapid and thorough-going devolution of central power to provincial and other regional authorities.

To make sense of these developments and trajectories in Indonesia and China, traditional rule of law paradigms make for blunt tools

indeed. Neither of these countries ever established anything commonly recognized as the rule of law. But neither can we describe their legal systems simply by its absence nor by retreat to concepts such as rule by law. Likewise, we would not gain much by clinging to rule of law subtypes to analyze Indonesia's or China's presumed partial rule of law development.

CONCEPTUAL FRAMEWORK AND MOTIVATING QUESTIONS

Legal regimes are shaped first by the interaction of social groups and individuals with the state, and then by the interaction of states with legal institutions. Specifically, there are two basic dimensions to legal regimes: (1) the level of openness or changeability of the polity (or constellation of politically empowered social actors) and (2) the degree and manner of intervention into the legal system's handling of specific cases by other state institutions or empowered actors. Though neither is easy nor simple to measure, they are both less unwieldy and more elucidative than other aspects of legal orders. Based on these two dimensions, which are not directly part of the outcomes we want to study, we can build a typology of legal regimes, as outlined in Figure I.1.

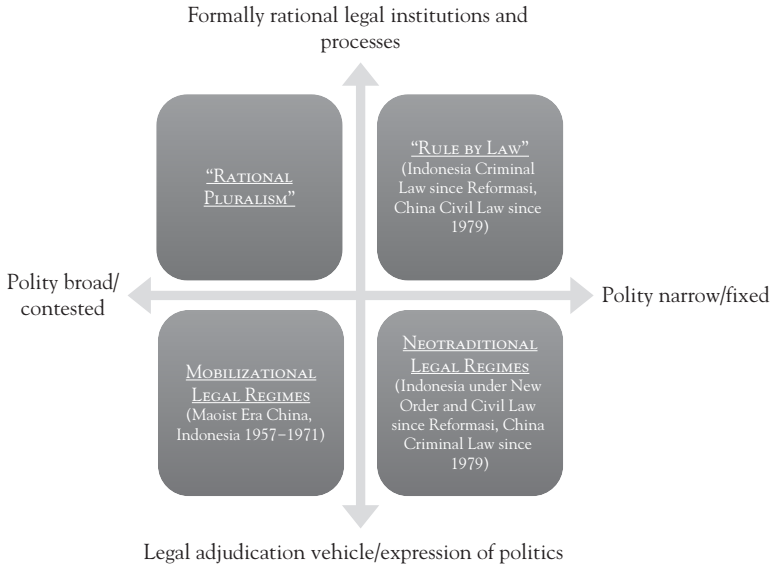

Figure I.1 Legal regimes

Where the polity is pluralistic and open and other parts of the state do not interfere in the work of legal institutions, we can observe a kind of rational pluralism that likely approximates commonly held understandings of a rule of law. In such legal regimes, courts and other legal actors are independent, citizens have access and influence in the political system, and there is a minimal gap between social and legal norms. This is the order many seem to assume exists (at least as an ideal-type) in well-functioning democracies with powerful and independent legal systems that apply the law consistently and without bias to all who seek justice.

Where the polity is open or in flux, but there is heavy interference in individual cases by other state institutions or extra-legal actors, we see mobilizational legal regimes. Here, powerful new players coming to the fore in the political arena use state institutions as tools for refashioning legal systems to support the new orders of power and social relations they hope to establish. If single actors dominate, such legal regimes may become charismatic. If multiple actors contend over protracted periods, these regimes can be quite violent and unstable. Such regimes are common in countries undergoing extreme political change or which have recently undergone such change and have yet to establish more regularized structures of power and authority.

Where the polity is closed and fixed, but legal institutions handle cases relatively free of interference, legal regimes promote a "rule by law" order. Legal institutions are relatively independent, consistent, and legitimate, yet their work at root supports entrenched political and social hierarchies and relationships. Such regimes are common in developmentalist states, where conservative authoritarian rulers prioritize predictability in transactions and the lowering of costs. They also help bolster the legitimacy of unelected or otherwise non-validated political elites, even in nominally democratic contexts.

Finally, where we see closed polities and widespread intervention into specific cases by nonlegal actors, neotraditional legal regimes dominate. In such regimes, established conservative hierarchies actively use their political power to ensure that the legal system reinforces their dominant positions in wider social and political realms. Such orders are common in colonial and postcolonial states, as well as in authoritarian countries with consolidated structures of power, far removed from any revolutionary upheaval. They help preserve the positions of those in

power, but do not improve the state's legitimacy or generally facilitate market economic development.

As shall be further elaborated in the chapters to come, China was characterized by a mobiliztional legal regime throughout the Maoist period (1949–76); since 1979, it has had a hybrid legal regime (neotraditional in the criminal arena and rule by law for civil dispute resolution). Indonesia was marked by a neotraditional legal regime during the Liberal Democracy period (1949–57), which then gave way to a mobilizational regime during Guided Democracy and the early years of New Order (1957–c. 1971). During Suharto's heyday (1974–98), Indonesia had a neotraditional regime in both civil and criminal law, while since *Reformasi* (1998) it has had a hybrid that is the converse of China's – rule by law for the criminal justice system and neotraditional in the civil arena. These regimes were shaped by the political and social realities of their times and places but also exerted important and distinct causal influence upon their countries' political and social systems.

Simply categorizing these national-level cases is a major step forward and contributes much to understanding how states, citizens, and social groups interact. But, beyond this, I also seek to parse the varieties of micro-level state-society relations under different legal regimes in the context of criminal prosecution and social control versus civil litigation's emphasis on providing consistent dispute resolution. Furthermore, I examine the dynamics of institutions and adjudication specific to the distinct structural settings of urban and rural areas.

COMPARING CHINA AND INDONESIA AND COMPARING WITHIN EACH

At first glance, Indonesia and China may not seem readily comparable. Asia's largest continental nation and the world's largest archipelago, one of the world's least religious societies and a country in which everyone must belong to an official religion, a nominally still-socialist state and an emerging democracy with a long history of military dictatorship do not appear to have much in common. This, however, is precisely part of the appeal. Both China and Indonesia came into being in their contemporary forms within months of each other, in October and December 1949, respectively. Both are large and complex societies with vast regional differences and sharp distinctions

between their rural and urban areas. Both also have had very similar levels of per capita income, even as Indonesia surged ahead in the 1970s and 1980s, before China moved ahead economically after Asia's 1997–8 financial crisis. The two countries are sufficiently similar to be comparable, yet different enough to provide an array of clear contrasts.

These contrasts are useful because of the way I apply legal regimes to the study of the two countries. Rather than having fixed and monolithic legal regimes, both Indonesia and China have been characterized by multiple legal regimes over time and even in different areas of the law or in different subnational contexts. Holding constant national-level political structures and dynamics lets us shed light on how civil and criminal law, for example, can be characterized by different legal regimes within the same country. Similarly, urban and rural courts often work differently in both countries, given disparate economic and political resources. Yet looking across the two cases also exposes which political variables exert consistent influence and helps rule out otherwise seductive, yet spurious, explanations rooted in idiosyncratic aspects of one or another political system. Looking comparatively *within* each of the two states adds nuance and accuracy, while comparing *between* the two countries enhances parsimony and generalizability.

The advantages of most-similar systems designs for subnational comparative analysis are well established (e.g. Snyder 2001; Hurst 2009, 2010). By holding constant many potential independent variables, we can see more clearly the influence of those with differing values across subnational regions or institutions (such a method has been widely and well employed in the study of Chinese politics, e.g. Whiting 2000; Tsai 2002). Less appreciated is the potential of combining such within-country analysis with a most-different systems design to nest the subnational research within a larger cross-national comparison. Such an additional step provides an additional test of hypothesized causal relationships, as similar causes can be matched with similar outcomes across cases that are otherwise quite disparate.

Comparing civil litigation with criminal prosecution, courts in cities with those in rural areas, and specific time periods with others, allows for several vital dimensions of subnational comparison in Indonesia and in China. Looking across these two distinct national contexts offers an opportunity for exactly the sort of previously under-explored nesting strategy just discussed. By examining different areas of the law

in both urban and rural settings over time and across both China and Indonesia, I endeavor to build a theory of law and politics outside the democratic and wealthy core that is both more nuanced and more generalizable than what has been possible in previous studies.

Before dissecting the anatomy of legal regimes, it is necessary to pin down their conceptual shapes and specific theoretical utility. This is the task to which the next chapter turns.